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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

NO. 435

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

POOL MANUFACTURING COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING THE PETITION FOR WRIT OF CERTIORARI

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Respondent, Pool Manufacturing Company, pursuant to Rule 7, Paragraph 3, and in lieu of a motion to dismiss the petition for certiorari, asserts the following objections to the jurisdiction of this Court, and to the granting of the writ:

(a) The instant case does not involve matters of general public interest, or of public importance, but is admittedly shown to be brought before this Court

because of the Board's alleged dificulties in securing enforcement of its orders in the Fifth Circuit. This Court does not have jurisdiction to consider this case upon the ground that the Board desires that the Judges of the Fifth Circuit Court be reprimanded and brought into conformance with the Board's conception of its policy and duty, nor to cause the Fifth Circuit's ratio of decisions in favor of the Board to conform to the average of other Circuits.

(b) This Court is without jurisdiction under the law to act as monitor of the several United States Courts of Appeal and the petition for certiorari should be stricken and denied because of the improper action of counsel for Petitioner in using the petition as a vehicle for criticism of the Judges of the Fifth Circuit, coupled with counsel's action in releasing the contents of the petition to the newspapers for the sole and only purpose of intimidating and embarrassing the Judges of the Fifth Circuit.

(c) Petitioner did not give timely notice of its action in securing an extension of time for filing the petition for certiorari, and in the absence of such notice, this Court should view the judgment of the Fifth Circuit as final and decline jurisdiction because of the covert action of the Petitioner.

(d) The judgment of the Court below in granting Respondent's motion to take additional evidence under Section 10(e) of the applicable statute was proper.

ARGUMENT

I.

Grounds (a) and (c) that the case is not of public importance and jurisdiction does not lie to monitor the Fifth Circuit.

Respondent believes and will hereafter show that the order of the Fifth Circuit was proper under the applicable provisions of the statute governing this proceeding. But more important to the policy of this Court, and of concern to Respondent's counsel, is the effort to use certiorari as an intimidatory method of expressing the statistical pique of the National Labor Relations Board. When that admitted effort is coupled with a deliberate attempt to influence the action of this Court by newspaper publicity, dismissal of the petition and denial of the writ are appropriate.

Petitioner, under the law, occupies the same position before this Court as any suitor. It occupied a similar status before the Court below. In its administrative capacity, and in its role as prosecutor, the National Labor Relations Board, within the statute, has a justified administrative bias against all employers. In its capacity as litigant, however, the statute contemplates that it is a litigant and nothing more. Its representatives owe the respect to law and the judiciary due alike from all officers of the Court. Each particular case must stand or fall on its own merits. The Courts have not yet been made an auxiliary to the administrative function of the Executive Department of the Govern-

ment. Notwithstanding the statutory weight accorded the findings of the Board, its determinations of law and its rights as a party litigant are governed by principles binding alike upon it and the individual citizen in opposition. That is not the conception of the litigation presented by the petition for certiorari. The Board uses its administrative desire and policy as an end toward which the judicial process is to be directed whereas under our constitution, the judicial process is directed solely at equal justice, irrespective of whether the Board's conception of its policy is served or hindered.

Obviously, the petition for certiorari is bottomed upon facts wholly outside the record, particularly wherein the Board asserts the results of its litigation in other Circuits. Respondent has no knowledge of whether the Board's statements of fact in that regard are true, but Respondent is unwilling to have this Court act upon them on the assumption that the Board would not misrepresent them. We believe the effort to ground certiorari on facts outside the record is wholly improper in this instance, as it would be if any other litigant or lawyer asserted that injustice was done because his batting average in the Fifth Circuit was adverse.

It will be observed that in discussing the action of other Circuit Courts, the Board does not cite authorities or make an effort to show that the decisions of other Circuits are either right or wrong. It openly seeks review upon the ground that since the Fifth Circuit statistics are not as favorable as the question-

ed statistics from other Courts, that the Fifth Circuit is necessarily ignorant or determined to defeat the law.

II.

The instant case was correctly decided in the Court below.

This case does not involve a contention on the part of the Respondent, nor a judicial determination, to the effect that mere compliance with the order of the Board is sufficient of itself to prevent a judicial decree of enforcement. Respondent filed (Record P.59) a motion pursuant to Sec. 10(e) of the statute for leave to present additional evidence. (Appendix P. 9.) As grounds for the motion, Respondent alleged that the order sought to be enforced had been rendered on August 26, 1946, almost three years prior to the proceeding in the Court below. That following the order of the Board, Respondent accepted it and posted notices required by the Board. Respondent alleged that the union did not seek to bargain with Respondent until January of 1948, and that the parties met and exchanged proposals and counter proposals, but did not reach an agreement. Respondent's motion said that the circumstances concerning the bargaining relation had substantially changed since the entry of the Board, and that additional evidence should be taken for the Board "to determine whether the order entered almost three years ago should now be revised or set aside to determine the question of whether United Garment Workers . . . does in fact represent a majority of the employees within the unit, or whether the employees

desire to exercise their right to choose another bargaining agent, or to bargain for themselves." (R. 59)

The Respondent further set out under oath that the applicable statute under which the order was entered had been amended by the Labor Management Relations Act of 1947, and that under that Act the duty to bargain in good faith was now reciprocal. That the union had not bargained in good faith and had not endeavored to bargain with Respondent and that the change in circumstances of fact and law should now be considered by the Board for it to determine whether a different administrative order should be entered. Respondent's motion in part said "in that connection Respondent would show that the order of the Board and the enforcement order of the Court are prospective in nature, designed to establish a collective bargaining relation in the future, as distinguished from penalizing any party for acts and transactions which occurred more than four years ago." (Record P. 61). The order in the instant case is prospective, that is, it directs the Respondent to bargain in the future with the certified union. The whole purpose of the statute is to permit the administrative agency to shape its orders to the objective of good labor relations and collective bargaining. Granted that the Board is not to be in any sense penalized for failure to secure enforcement of its order promptly, nevertheless the Board itself is entitled and required under its administrative practice to afford the employees full freedom, and is entitled and does in administrative practice revise and shape its orders under such facts by ordering new elections, decertify-

ing bargaining agents or otherwise achieving the objectives of the statute. The order in question was predicated on labor relations far in the distant past. Respondent suggested material and relevant evidence to the establishing of sound statutory relations for the future, particularly relevant and material in a proceeding brought to secure future collective negotiations.

The authority on the question is NATIONAL LABOR RELATIONS BOARD V. INDIANA AND MICHIGAN ELECTRIC COMPANY, 318 US 9; 87 Law Ed. 579. In that case Mr. Justice Jackson held that an application of the type filed by Respondent in the instant case "was addressed to the sound judicial discretion of the Court"; that the question presented to the Supreme Court was whether the Court below had abused its discretion.

In the instant case we feel that no showing of abuse of discretion has been made or attempted. There is no claim that the facts alleged in Respondent's application to take additional evidence are not of concern to the Board nor any effort to show that the Board would not substantially reshape its order if in fact the parties have reached an impasse and, without interference by Respondent, the employees have withdrawn from the certified union. The ordinary course of the Board's procedure in such instances is to require fresh evidence that the ancient certification reflects a current majority, sometimes by ordering a new election, at other times by examining membership records. If in fact

(1) This court held in National Labor Relations Board v. Jones and Laughlin, 331 US 416; 91 Law Ed. 1575 & 1582 that remand to the Board for post order fact findings is proper.

another union represents a portion of the employees, it too has rights under the statute. All of these matters are relevant and material not only to the Respondent and employees in establishing a sound relation, but to the Board in following its accepted administrative policy.

CONCLUSION

WHEREFORE, Respondent, Pool Manufacturing Company, prays that the petition for certiorari be dismissed.

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APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer -

* * * * *

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, et seq.) are as follows:

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropri-

ate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript.* * *